Lee Kean Choon v Khoo San & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01(NCvC)(A)-776–10 OF 2022 AND B-01(NCvC)(A)-806–11 OF 2022

AZIZAH NAWAWI, AZIZUL AZMI ADNAN AND MOHD FIRUZ JJCA

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Land Law — Co-proprietorship — Partition — Validity of partition application without consent of co-proprietor — Appeal against the Director General of Lands and Mines — Whether requirement to file appeal under s 418 of National Land Code fulfilled — Whether High Court had powers to grant application for extension of time to file appeal — Whether service of notice to co-proprietor on application for partition regular

In 1971, the plaintiff's father and the first defendant entered into an agreement (1971 Agreement) to purchase a piece of land ('GRN 39612'). Upon the successful purchase of the said land, the plaintiff occupied the upper northern portion of the land, whilst the defendant occupied the lower southern portion. The plaintiff's father's undivided share in GRN 39612 was later transferred to plaintiff ('appellant'). In 2015, part of the said land was acquired by the Government where GRN 39612 was divided into Geran 326882 and Geran 326883. Notwithstanding the said acquisition, both the plaintiff and the first defendant remained as co-proprietors on both titles. On 4 February 2020, the first defendant applied for the partition of Geran 326882 and Geran 326883 whereby the second defendant approved the application for partition for Geran 326882 and Geran 326883 on 7 August 2020. This application was, however, not made known to the plaintiff. Circa 2021, the plaintiff took steps to apply for partition of the land. In early March 2021, the land surveyor from the Land Office furnished the plaintiff with a letter approving the partition of Geran 326882. The said letter showed that the application for partition was approved on 7 August 2020. Thereafter, the plaintiff issued letters dated 13 August 2021 and 26 August 2024 to the third defendant questioning the said application for partition and to request for the related documents. The plaintiff received the documents requested on 18 August 2021 and discovered that the defendant had applied to partition both Geran 326882 and Geran 326883 without adhering to the terms of the 1971 Agreement. The plaintiff then lodged a private caveat on the title and filed an ('OS') applying for, inter alia, leave of court to file the appeal in the High Court against the second defendant's decision to approve the first defendant's application to partition the lands held under Geran 326882 and Geran 326883. In support of the OS, the plaintiff, amongst others, contended that the service of the notice to the co-proprietor with regards to the application to partition the land by way of

substituted service by third defendant was pre-mature and against s 432 of the National Land Code ('the NLC'). On the contrary, the first defendant also filed a counterclaim against the plaintiff. The high court dismissed the plaintiff's OS with on the grounds that: (a) under s 418 of the NLC, the plaintiff was required to file appeal against the second defendant's decision to partition the land at least three months from the date the plaintiff was notified and came to know of the second defendants' decision in approving the first defendant's application for partition of the land held under Geran 326882; and (b) with reference to the plaintiff's application to extend the time to file his appeal against the second defendant's decision, the High Court had no powers to extend the period stipulated under s 418 of the NLC. the first defendant counterclaim was also dismissed. The issues that arose for determination were: (i) whether the service of the notice by way of substituted service by the third defendant was valid; and (ii) whether the time for the plaintiff to lodge the appeal commenced from early March 2021 or from 18 August 2021.

Held, dismissing the appeal:

(1) The notice of the first defendant's application to the second defendant was served to the plaintiff by the third defendant by way of substituted service. This was done by affixing a copy of the said notice on a courthouse around 14 February 2020 and by publishing a copy of the said notice in the Gazette on 12 March 2020 as required under s 432(1)(a)(ii) and (b) of the NLC. The attempt to serve the said notice by way of personal service was however done on 19 February 2020 which was well after the notice by way of substituted service was deemed served on the plaintiff. As the substituted service was affected earlier than the attempt to serve by way of personal service, the substituted service which was affected on 14 February 2020 was irregular and premature (see paras 46–48).

(2) It was axiomatic that the three month time timeline to file the appeal under s 418 of the NLC, must for all intent and purposes be calculated from the date the plaintiff was informed about the decision of partitioning in early March 2021 and not from the date the plaintiff received the documents about the partition from the second/third defendants in August 2021. Therefore, although the substituted service was irregular and premature, the plaintiff's appeal to the High Court was out of time. Accordingly, the decision of the High Court judge not to allow the first defendant's counterclaim for a declaration that the 1971 Agreement was frustrated for circumstances beyond the control of both parties and no to award any form of compensation sought for was correct (see paras 52–54).

[Bahasa Malaysia summary

Pada tahun 1971, bapa plaintif dan defendan pertama memasuki satu perjanjian (perjanjian 1971) untuk membeli sekeping tanah ('GRN 39612'). Setelah berjaya membeli tanah tersebut, plaintif menduduki bahagian atas utara tanah itu, manakala defendan menduduki bahagian bawah selatan. Bahagian tidak pecah bahagi bapa plaintif dalam GRN 39612 kemudiannya dipindahkan kepada plaintif ('perayu'). Pada tahun 2015, sebahagian daripada tanah tersebut telah diambil alih oleh Kerajaan di mana GRN 39612 dibahagikan kepada Geran 326882 dan Geran 326883. Walaupun pengambilalihan tersebut telah berlaku, plaintif dan defendan pertama tetap menjadi pemilik bersama bagi kedua-dua hak milik tersebut. Pada 4 Februari 2020, defendan pertama memohon pembahagian Geran 326882 dan Geran 326883 di mana defendan kedua meluluskan permohonan pembahagian Geran 326882 dan Geran 326883 pada 7 Ogos 2020. Permohonan ini walau bagaimanapun tidak dimaklumkan kepada plaintif. Sekitar 2021, plaintif mengambil langkah untuk memohon pembahagian tanah. Pada awal Mac 2021, juruukur tanah dari Pejabat Tanah telah memberi plaintif surat meluluskan pembahagian Geran 326882. Surat tersebut menunjukkan bahawa permohonan pembahagian telah diluluskan pada 7 Ogos 2020. Selepas itu, plaintif mengeluarkan surat bertarikh 13 Ogos 2021 dan 26 Ogos 2024 kepada defendan ketiga yang mempersoalkan permohonan pembahagian tersebut dan meminta dokumen berkaitan. Plaintif menerima dokumen yang diminta pada 18 Ogos 2021 dan mendapati defendan telah memohon untuk membahagikan kedua-dua Geran 326882 dan Geran 326883 tanpa mematuhi terma Perjanjian 1971. Plaintif kemudiannya memasukkan kaveat persendirian atas hakmilik dan memfailkan ('OS') memohon, antara lain, kebenaran mahkamah untuk memfailkan rayuan di Mahkamah Tinggi terhadap keputusan defendan kedua untuk meluluskan permohonan defendan pertama untuk membahagikan tanah yang dipegang di bawah Geran 326882 dan Geran 326883. Dalam menyokong OS, plaintif, antara lain, berpendapat bahawa penyampaian notis kepada pemilik bersama berkenaan permohonan untuk membahagikan tanah melalui penyampaian ganti oleh defendan ketiga adalah pramatang dan bertentangan dengan seksyen 432 Kanun Tanah Negara ('KTN'). Sebaliknya, defendan pertama juga memfailkan tuntutan balas terhadap plaintif. Mahkamah Tinggi menolak OS plaintif dengan alasan bahawa: (a) di bawah s 418 KTN, plaintif dikehendaki memfailkan rayuan terhadap keputusan defendan kedua untuk membahagikan tanah tersebut dalam tempoh sekurang-kurangnya tiga bulan dari tarikh plaintif dimaklumkan dan mendapat tahu mengenai keputusan defendan kedua yang meluluskan permohonan defendan pertama untuk pembahagian tanah yang dipegang di bawah Geran 326882; dan (b) berhubung dengan permohonan plaintif untuk melanjutkan masa bagi memfailkan rayuan terhadap keputusan defendan kedua, Mahkamah Tinggi tidak mempunyai kuasa untuk melanjutkan tempoh yang telah ditetapkan di bawah s 418 KTN. Tuntutan

balas oleh defendan pertama turut ditolak. Isu-isu yang timbul untuk diputuskan adalah: (i) sama ada penyampaian notis melalui penyampaian ganti oleh defendan ketiga adalah sah; dan (ii) sama ada tempoh untuk plaintif mengemukakan rayuan bermula dari awal Mac 2021 atau dari 18 Ogos 2021.

Diputuskan, menolak rayuan:

(1) Notis permohonan defendan pertama kepada defendan kedua telah disampaikan kepada plaintif oleh defendan ketiga melalui penyampaian ganti. Ini dilakukan dengan menampalkan salinan notis tersebut di mahkamah sekitar 14 Februari 2020 dan dengan menyiarkan salinan notis tersebut dalam Warta pada 12 Mac 2020 seperti yang dikehendaki di bawah s 432(1)(a)(ii) dan (b) KTN. Percubaan untuk menyampaikan notis tersebut melalui penyampaian kediri bagaimanapun dilakukan pada 19 Februari 2020 iaitu selepas notis dengan cara penyampaian ganti itu dianggap telah disampaikan kepada plaintif. Memandangkan perkhidmatan gantian telah dilakukan lebih awal daripada percubaan untuk penyampaian melalui penyampain kediri, penyampaian ganti yang dilakukan pada 14 Februari 2020 adalah tidak teratur dan pramatang (lihat perenggan 46–48).

(2) Ia adalah suatu perkara yang tidak dapat dinafikan bahawa tempoh masa tiga bulan untuk memfailkan rayuan di bawah s 418 KTN hendaklah, bagi semua maksud dan tujuan, dikira mulai tarikh plaintif dimaklumkan mengenai keputusan pembahagian tersebut pada awal Mac 2021, dan bukannya dari tarikh plaintif menerima dokumen-dokumen berkaitan pembahagian tersebut daripada defendan kedua/ketiga pada Ogos 2021. Oleh itu, walaupun penyampaian ganti yang dilakukan adalah tidak teratur dan pramatang, rayuan plaintif kepada Mahkamah Tinggi adalah di luar masa. Sehubungan itu, keputusan hakim Mahkamah Tinggi untuk tidak membenarkan tuntutan balas defendan pertama bagi satu deklarasi bahawa Perjanjian 1971 telah dikecewakan oleh keadaan di luar kawalan kedua-dua pihak dan untuk tidak memberikan sebarang bentuk pampasan seperti yang dituntut adalah tepat (lihat perenggan 52–54).]

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Datin Sohaila binti Adom (wakil diri bagi Adom bin Haji Ma'adil, simati) v Einstein Tay [2016] MLJU 1650, CA (refd)
Land Executive Committee of the Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234; [1980] CLJU 150, FC (refd)
Mohd Nadir bin A Syed Ahamed & lain-lain lwn Zubaidi bin Abdul Hamid & lain-lain [2000] 6 MLJ 241, FC (folld)
Mohd Nadir bin A Syed Ahamed & Ors v Zubaidi bin Abdul Hamid & Ors [1994] 2 MLJ 159, HC (refd)

A *Ong Chin Hai & Anor v Ong Hoo See & Ors* [2022] 5 MLJ 690, CA (refd)

Legislation referred to

National Land Code ss 136(1)(h), 140, 141, 141(1)(a), 141A, 142, 142(1)(e), (4)(b), 143, 143(2), 144, 145, 342, 343, 343(1)(b), 418, 432, 432(1)(a)(ii), (1)(b), Part Nine, Chapter 2, Form 9B

Appeal from: *Lee Kean Choon lwn Khoo San dan lain-lain* [2024] MLJU 2678 (High Court, Shah Alam)

Lee Lin Jun (Tee Tai Tzian & Sim) for the appellant.
Chai Bitt Yen (Ting & Ting) for the first respondent.
Namirah Hanum Mohamed Albaki (with Nurul Afiqah bt Abdul Ghaffar) (Deputy Public Prosecutor, Attorney General's Chambers) for the second and third respondents.

Mohd Firuz JCA:

INTRODUCTION

[1] The facts of this appeal are as gathered from the judgment of the learned High Court judge ('HCJ') and from the submissions of parties. We respectfully adopt them subject to some modifications.

[2] This was an appeal by the appellant who is the plaintiff in the High Court proceedings against the High Court's decision in dismissing the appellant/plaintiff's originating summons. For purposes of convenience, the parties shall be referred to as per their capacity in the High Court.

BACKGROUND

[3] On 4 November 1971, the plaintiff's father and the first defendant entered into an agreement to purchase a piece of land held under GRN 39612 Lot 5525 Mukim Kapar, Daerah Klang, Selangor ('GRN 39612').

[4] Upon the successful purchase of the said land, the plaintiff occupied the upper northern portion of the land (for the purpose of planting durian and other trees), whilst the defendant occupied the lower southern portion (for the purpose of palm oil cultivation).

[5] Over the years, the plaintiff's father's undivided share in GRN 39612 was later transferred to plaintiff.

[6] On 13 October 2015, part of the said land was acquired by the

Government to build Jalan Kampung Bukit Kerayong, where GRN 39612 was divided into Geran 326882, Lot 15951, Mukim Kapar, Daerah Klang, Selangor ('Geran 326882') and Geran 326883, Lot 15952, Mukim Kapar, Daerah Klang, Selangor ('Geran 326883'). Notwithstanding the said acquisition, both the plaintiff and the first defendant remain the co-proprietors on both titles.

[7] In 2019, due to construction of the West Coast Expressway ('WCE'), the main access road was completely blocked, where the first defendant lost his access to his part of the land.

[8] On 4 February 2020, the first defendant applied for the partition of Geran 326882 and Geran 326883. On 7 August 2020, the second defendant then approved the application for partition for Geran 326882 and Geran 326883. This application was not made known to the plaintiff.

[9] Circa 2021, the plaintiff took steps to apply for partition of the land. In early March 2021, the land surveyor from the Klang Land Office furnished the plaintiff with a letter approving the partition of Geran 326882 dated 3 September 2020. The said letter showed that the application for partition was approved on 7 August 2020.

[10] Thereafter, the plaintiff's solicitors issued letters dated 13 August 2021 and 26 March 2024 to the third defendant questioning the said application for partition and to request for the related documents. The plaintiff had also requested that the partition of the land be carried out based on the terms of the 1971 Agreement.

[11] The plaintiff received the documents requested on 18 August 2021 and discovered that the defendant had applied to partition both Geran 326882 and Geran 326883 without adhering to the terms of the 1971 Agreement.

[12] Having written to the first defendant, the second defendant and the third defendant on 21 September 2021 to voice out his disagreement with the manner partition was granted, the plaintiff then lodged a private caveat on the title and successfully prevented further action by the second and third defendants.

LEGAL PROCEEDINGS

[13] The plaintiff through his originating summons ('OS') on 3 November 2021 applied for the following:

(a) leave of court to file the appeal in the High Court against the second

A defendant's decision dated 7 August 2020 to approve the first defendant's application dated 11 February 2020 to partition the lands held under Geran 326882 and Geran 326883;

(b) extension of time t o file the plaintiff's OS to appeal against the second defendant's decision in the High Court;

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(c) declarations to the effect that the second defendant's approvals to partition the lands are ultra vires and invalid, hence to be set aside; and

(d) a declaration to revoke the four titles which were issued as a result of the second defendant's approvals to partition lands and that Geran 326882 and Geran 326883 be restored and remain in force.

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[14] In response the OS, the first defendant also filed a counterclaim against the plaintiff seeking, inter alia, for an order declaring the 1971 Agreement as frustrated, for loss of income of his oil palm plantation and for his portion of the compensation for land acquisition exercise which was paid to the plaintiff.

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[15] On 5 October 2022, the High Court dismissed both the plaintiff's OS with costs and the first defendant's counterclaim but allowed the removal of the plaintiff's caveats.

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THE HIGH COURT'S DECISION

[16] The learned HCJ's decision can be summarised as follows:

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(a) under s 418 of the National Land Code 1965 (Revised 2020) ('the NLC'), the plaintiff was required to file appeal against the second defendant's decision to partition the land under s 418 of the National Land Code 1965 (Revised 2020) ('the NLC') at least three months from the date the plaintiff was notified and came to know of the second defendant's decision in approving the first defendant's application for partition of the land held under Geran 326882;

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(b) based on the evidence before the court, the three months should be calculated from the date the plaintiff was informed about the decision of partitioning ie in March 2021 ie at most before 1 July 2021 and not from the date they received the documents about the partition from the second or third defendants;

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(c) ipso facto, the High Court therefore had no jurisdiction to allow plaintiff's appeal under s 418 of the NLC;

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(d) with reference to the plaintiff's application to extend the time to file his appeal against the second defendant's decision, the High Court has no powers to extend the period stipulated under s 418 of the NLC (see the case of *Mohd Nadir bin A Syed Ahamed & Ors v Zubaidi bin Abdul Hamid*

& Ors [1994] 2 MLJ 159); and

(e) the specific provision under s 418 of the NLC cannot be circumvented by an application for a declaratory relief as decided by the Federal Court in *Land Executive Committee of the Federal Territory v Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234; [1980] CLJU 150. The plaintiff's failure to adhere the requisite timeline provided was therefore fatal.

THE FIRST DEFENDANT'S COUNTERCLAIM

(a) with reference to the first defendant's counterclaim, the evidence adduced was insufficient to support his claim that the 1971 Agreement was frustrated;

(b) there was no credible evidence adduced to prove that as a result of the land acquisition which caused the land held under Geran 39612 to be separated into Geran 326882 and 326883, the first defendant no longer had access to his portion under the 1971 Agreement;

(c) the evidence adduced shows that despite the 2015 acquisition, the first defendant still had access to his land. Furthermore, the first defendant had not raised any issue on the fact that he could not gain access to his land to carry out plantation activities;

(d) the 2015 land acquisition could not be said to cause a change of circumstances that resulted in a fundamental and radical change to rights and obligations of the first defendant and the plaintiff which rendered the 1971 Agreement impossible of being performed;

(e) the rights of both the plaintiff and the first defendant as the registered co-proprietors on Geran 326882 based on the law and their physical possession was not adversely affected despite the land acquisition exercise and the issuance of the two separate titles under Geran 326882 and 326883;

(f) even if the changes can be said to have the effect of frustrating the 1971 Agreement, that change was caused by the first defendant's own act in applying for the partition of both Geran 326882 and 326883. This was not a change that was beyond the control of the first defendant but a self-induced frustration; and

(g) in light of the aforesaid, both the plaintiff's claim and the defendant's counterclaim were dismissed with no order as to cost.

THE APPEAL

Summary of the plaintiff's submission

[17] In the memorandum of appeal, the plaintiff raised several grounds. The main thrust of the plaintiff's appeal was that the learned HCJ had failed to judicially evaluate and appreciate the evidence before the court. Learned counsel for the plaintiff invited the second and third defendants to intervene as it was the plaintiff's contention that the learned HCJ had erred in failing to appreciate that the agreement dated 4 November 1971 between plaintiff's father and the first defendant is still valid and enforceable under the law that bind both parties including their heirs.

[18] Learned counsel for the plaintiff focused his submissions on the following grounds:

(a) the land acquisition by the Government for GRN 39612 and the blocked access to the main access road due to construction of the WCE were not concrete reasons to frustrate the 1971 Agreement between parties;

(b) the decision by the second defendant on partitioning of the land without the first defendant submitting the 1971 Agreement was ultra vires and therefore invalid;

(c) prior consent is required from other co-proprietor before making application to partition the land;

(d) the plaintiff has caveat able interest to enter caveat on the land as the first defendant's application for partition was made without the plaintiff's consent as co-proprietor;

(e) the OS filed by the plaintiff was in accordance to s 418 of the NLC; and

(f) the service of the notice to the co-proprietor with regards to the application to partition the land by way of substituted service by third defendant was pre-mature and against s 432 of the NLC.

[19] Learned counsel for the plaintiff submitted that where there is no fundamental or radical change in the obligation originally undertaken in a contract that make it incapable to perform, the contract does not become impossible and it is not discharged by frustration.

[20] It was further argued that even though ss 141A and 142(1)(e) of the NLC dispensed of the consent from co-proprietor for partition, the first defendant should have informed and obtained consent from the plaintiff prior to the application for partition. In the event, the plaintiff does not agree to the first defendant's request for partition, the consent can be dispensed with.

[21] Thus, the existence of the 1971 Agreement cannot be denied and therefore, it has to be brought to the knowledge of the second/third defendants when the application to partition was submitted by the first defendant. The

approval given by the second defendant without the plaintiff's consent and without relying on the 1971 Agreement are clearly ultra vires and invalid.

[22] Learned counsel for the plaintiff further contended that on about early March 2021, the plaintiff was informed about the second defendant's approval letter for the partition dated 3 September 2020 and requested the then plaintiff's solicitor to contest the approval letter via a letter issued by the solicitor dated 26 March 2021. The documents and details about the approval of the application to partition were only served to the plaintiff by the third defendant on 18 August 2021. Hence, the three months to appeal via s 418 of the NLC should be calculated from 18 August 2021. If the three months count from March 2021, the appeal would be dismissed as no sufficient particulars to prove cause of action.

[23] Lastly, the plaintiff's learned counsel submitted that the service of the notice by way of substituted service by the third defendant was against s 432 of the NLC as it was done pre-maturely. This is due to the fact that substituted service was effected on 14 February 2020 whereas the attempt for personal service was carried out on 19 February 2020 ie after the substituted service process on 14 February 2020. The substituted service was therefore not valid.

The first defendant's submission

[24] In response, learned counsel for the first defendant submitted that the plaintiff's originating summons was filed out of time as the approval letter for partition dated 3 September 2020 was communicated to the plaintiff on early March 2021. This was confirmed by the then plaintiff's solicitors, Messrs Rafik Rahim & Associates via letter dated 26 March 2021 .

[25] Under s 418(1) of the NLC, the plaintiff was required to file appeal via originating motions at least three months from March 2021 which is at least by July 2021. No reasons were given by the plaintiff on the delay of filing the OS. Section 418(1) of the NLC also does not confer any power on the High Court to extend the time period to file appeal against the second defendant's approval for partition.

[26] The learned counsel for the first defendant contended that the first defendant requires the approval for partition in order to gain access to the first defendant's part of the land.

[27] It was then submitted that the various declarations applied by the plaintiff are in fact part of the remedies similar with and overlapping with the right to appeal under s 418 of the NLC.

[28] Further, the first defendant as a co-proprietor is entitled to apply for partition without permission or signature of the plaintiff regardless of the 1971 Agreement. The application for partition under s 141A of the NLC were in order.

The second and third defendant's submission

[29] According to learned counsel for the second and third defendants the process for the partition of the land held under GRN 326882 and GRN 326883 were in order and valid because s 141A of the NLC allows the other co-proprietors of the land to apply for the partition of the land.

[30] I t was argued that on 19 February 2020, since the plaintiff did not sign the Form 9B herein (pursuant to s 141A of the NLC), the third defendant had notified the co-proprietor (plaintiff) of the proposed partition. The notice concerned was served to plaintiff's last known address as per the land search carried out, but could not be served as the plaintiff had moved out from that address. The third defendant also served the notice to the plaintiff by way of substituted service under s 432 of the NLC by affixing a copy of that notice at the Klang Sessions Court and publishing the notice in the *Gazette*.

[31] Since there were no objections from the plaintiff, after due consideration, the third defendant approved the application to partition the land and recommended to the second defendant for the application to be approved. This action was done in accordance with s 142(4)(b) of the NLC. The second defendant had duly considered the recommendation made by the third defendant and after being satisfied with the proposals where the plaintiff's right to access the road was not denied and the size of the land remain the same as before partition, the second defendant then approved the application by virtue of s 143(2) of the NLC on 7 August 2020.

[32] Finally, learned counsel for the second and third defendants argued that the plaintiff's application was out of time as it was not made within three months of the date the plaintiff claimed to be informed of the approval to partition of land as stipulated in s 418 of the NLC.

THE LEGAL PRINCIPLES APPLICABLE

[33] Section 342 of the NLC defines 'co-proprietorship' as follows:

> 342 Meaning of co-proprietorship, and when it arises
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> (1) In this Act 'co-proprietorship' means the holding of alienated land by two or more persons or bodies in undivided shares.

(2) All alienated land vested in two or more persons or bodies shall be held by them as coproprietors unless, pursuant to section 344 or 346, or the corresponding provisions of any previous land law, they are registered as trustees or representatives.

[34] Section 343 further defines the rights of co-proprietors as:

343 Incidents of co-proprietorship.

(1) Where any land is vested in two or more persons or bodies as co-proprietors:

(a) their shares therein shall be deemed to be equal unless different proportions are specified in the memorial of registration;

(b) they may at any time apply for the partition of the land under Chapter 2 of Part Nine, but, so long as their co-proprietorship continues, shall each be entitled to possession and enjoyment of the whole; and

(c) on the death of any of them or, in the case of a body, its dissolution, the share to which he or i t was formerly entitled shall not pass to the other or others, but shall devolve upon his personal representatives or, as the case may be, be disposed of in the like manner as its other assets.

[35] In so far as the present appeal before us is concerned, the provisions of s 343(1)(b) empowers 'co-proprietors' to apply for partition.

[36] With reference to the partition of alienated lands, this is governed by Chapter 2 of Part Nine, ss 140 to 145 of the NLC. Pursuant to s 140(1) of the NLC, any alienated land held by co-proprietors may be partitioned by:

(a) the agreement between the co-proprietors; and

(b) the approval of the State Director (for land held under Registry title) or the Land Administrator (for land held Land Office title).

[37] Under s 141(1)(a) of the NLC, no partition shall be approved by the State Director or the Land Administrator unless each of the co-proprietors has either joined in, or consented to making the application for its approval.

[38] Notwithstanding the provisions in ss 140 and 141 of the NLC, the amended s 141A of the NLC states that any co-proprietor can make the application for approval to partition a land, where the other co-proprietors do not join in or consent in the making of the application.

[39] The Court of Appeal in *Ong Chin Hai & Anor v Ong Hoo See & Ors* [2022] 5 MLJ 690 stated the following:

[22] There was also no requirement under NLC for the co-proprietor who wished to terminate his co-proprietorship on the land to show that he had applied for the

land to be partitioned, but the application was rejected before he could come to court under s 145 of NLC.

[40] In the Court of Appeal case of *Datin Sohaila binti Adom (wakil diri bagi Adom bin Haji Ma'adil, simati) v Einstein Tay* [2016] MLJU 1650, the provisions of the s 141A was referred to, where it was held that:

[39] *After the 2008 amendment to section 141A, any co-proprietor may apply to the State Director or the Land Administrator for partition of the land if 'other co-proprietors neither join in nor consent to the making ofthe application'.*

[40] Even though the amended s 141A contains a similar condition as the condition in para 145(1)(a) (namely, the absence of participation or consent by any of the co-proprietors) for the making of an application for partition or termination of co-proprietorship, no amendment was made to s 145 by Parliament.

[41] It must also be borne in mind that the National Land Code (Amendment) Act 2008 also amended section 141 as well as ss 142 and 143 A to enable agricultural land to be subdivided even though i t is less than 2/5 of a hectare in area. Yet para 145 (1) (b) of the NLC was left untouched. A court order under para 145(1)(b) was previously the only way a co-proprietor could have agricultural land involving or resulting in areas of less than 2/5 of a hectare partitioned.

[42] *In our view, with the amendment to s 141A a co-proprietor, even a co-proprietor holding a minor share in land held under co-proprietorship, has an option of either applying under s 141A or under s 145 of the NLC for approval to partition the land held under such co-proprietorship.*

[41] Section 136(1)(h) of the NLC reads:

(1) No sub-division shall be approved by the State Director or, as the case may be, Land Administrator unless the following conditions are satisfied:

(h) that, *except in the case of any sub-divisional portion from which there will be direct access thereto, a satisfactory means of access will be available as of right from each such portion either to a road*, a river, a part of the foreshore or a railway station, or to a point within the land from which such a means of access will be available or be capable of being obtained by application to the Land Administrator under Part Twenty-eight.

[42] Section 418 of the NLC deals with appeals to the court:

418 Appeals to the Court

(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal the reform to the Court.

(2) Any such appeal shall be made in accordance with any written law for the time being in force relating to c ivil procedure; and the Court shall make such order thereon as it considers just.

(3) In this section, 'decision' includes any act, omission, refusal, direction or order.

[43] In *Mohd Nadir bin A Syed Ahamed & Ors v Zubaidi bin Abdul Hamid & Ors* [1994] 2 MLJ 159; [1994] 3 CLJ 204, the High Court dismissed the application for extension of time and held as follows:

> [2] An aggrieved person under s 418 of the NLC is given a substantive right to appeal against the decision of certain persons but that r ight is a limited right in that it has to be exercised within three months of the decision being communicated to him. The Rules of Court referred to in s 447 of the NLC, on the other hand, relate to rules of procedure, not substantive rules of law affecting the rights and disabilities of parties under the NLC. In short, s 447 is only a saving provision for Rules of Court to prevail in matters relating to procedure, and not substantive rights. In the premises the contention that s 447 herein empowers the court to enlarge the time limited by s 418 cannot be sustained.

[44] The decision in *Mohd Nadir* was later affirmed by the Federal Court in *Mohd Nadir bin A Syed Ahamed & lain-lain lwn Zubaidi bin Abdul Hamid & lain-lain* [2000] 6 MLJ 241 where it was held that:

> Rayuan plaintif difailkan di luar jangka masa yang ditetapkan s 418, yakni mereka terlewat satu hari.
>
> Di dalam keadaan ini, plaintif kemudiannya melalui Usul Pemula No 25–3–92 yang difailkan di Mahkamah Tinggi Alor Setar memohon perlanjutan masa untuk memfailkan rayuan di bawah s 418 KTN. Permohonan mereka telah ditolak dengan kos oleh YA Hakim KC Vohrah pada 7 Mac 1994. Terkilan dengan keputusan YA Hakim tersebut, plaintif telah merayu kepada Mahkamah Persekutuan dan Mahkamah Persekutuan yang bersidang pada 4 Oktober 1995 juga telah menolak rayuan mereka.
>
> Setelah gagal mendapatkan perlanjutan masa untuk merayu terhadap keputusan PTDL tersebut, kini plaintif melalui guaman sibil ini memohon untuk cuba mengenepikan keputusan PTDL tersebut dengan mendapatkan deklarasi bahawa keputusan PTDL tersebut adalah satu yang tidak sah 'nullity' dan terbatal (*void*).

DECISION

[45] For purposes of the present appeal, we are of the view that there are two main issues that has to be dealt with:

(a) firstly, whether the service of the notice by way of substituted service by the third defendant was valid? and

(b) secondly, whether the time for the plaintiff to lodge the appeal

commences from early March 2021 or from 18 August 2021?

Court's analysis on the first issue

[46] It is an undisputed fact that the notice of the first defendant's application to the second defendant was served to the plaintiff by the third defendant by way of substituted service. This was done by affixing a copy of the said notice on a court-house around 14 February 2020 (p 291 RR, *Bahagian* C, *Jld* 2A (encl 5) and by publishing a copy of the said notice in the *Gazette* on 12 March 2020 (p 294 RR, *Bahagian* C, *Jld* 2A (encl 5) as required under s 432(1)(a)(ii) and (b) of the NLC.

[47] The attempt to serve the said notice by way of personal service was however done on 19 February 2020 which was well after the notice by way of substituted service was deemed served on the plaintiff. This was confirmed by the third defendant's AIR at p 81 RR, *Bahagian* B, *Jld* 2 (encl 4), where the notice server, one Hafizul Alias affirmed that he could not locate the plaintiff at his address based on the official land search, on 19 February 2020 .

[48] As the substituted service was affected earlier than the attempt to serve by way of personal service, we therefore are of the considered view that substituted service which was affected on 14 February 2020 was irregular and premature as submitted by learned counsel for the plaintiffs.

Court's analysis on the second issue

[49] Under s 418 of the NLC:

> Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator *may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal there from to the Court*.

[50] The issue of when the period of three months is to be calculated was dealt extensively by the Federal Court in *Mohd Nadir bin A Syed Ahamed & lain-lain v Zubaidi bin Abdul Hamid & lain-lain*, where the applicant's appeal pursuant to the provisions of s 418 of the NLC therein, was filed out of time by one day.

[51] Whilst we do not condone the manner in which the second and third defendants effected substituted service of the notice of the first defendant's application for partition to the second defendant, we are constrained to state that based on the principle of stare decisis as explained by the Federal Court in the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645, we are obliged to follow the decision of the Federal Court in *Mohd*

Nadir bin A Syed Ahamed & lain-lain v Zubaidi bin Abdul Hamid & lain-lain.

[52] Based on the aforesaid decision, it is axiomatic that the three month timeline to file the appeal under s 418 of the NLC, must for all intent and purposes be calculated from the date the plaintiff was informed about the decision of partitioning in early March 2021 and not from the date the plaintiff received the documents about the partition from the second/third defendants in August 2021.

CONCLUSION

[53] In the upshot, notwithstanding our finding that the substituted service was irregular and premature, the plaintiff's appeal to the High Court was out of time.

[54] Accordingly, we agree with the decision of the High Court judge not to allow the first defendant's counterclaim for a declaration that the 1971 Agreement is frustrated for circumstances beyond the control of both parties and no to award any form of compensation sought for.

[55] We therefore, find no appealable error by the High Court and unanimously affirmed the decision of the learned High Court judge.

Appeal dismissed.

Reported by K Selvaraju